(10) (9) (10) (3)

Nos. 10-929, 10-931, 10-932, and 10-1058

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

SOUTHERN MISSOURI RECYCLING
AND WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE, et al.

PAM HEIN, STATE'S ATTORNEY
OF CHARLES MIX COUNTY, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE, et al.

YANKTON SIOUX TRIBE, et al.,
Cross-Petitioners,

v.

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS GOVERNOR AND ATTORNEY GENERAL

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INTRODUCTION

The Yankton Sioux Tribe, in its Conditional Cross-Petition (CCP), argues that, if South Dakota's Petition in No. 10-929 is granted, bringing the question of whether the Yankton Sioux Reservation has been disestablished before the Court, it should be allowed to argue for its preferred configuration of a diminished reservation.

The Tribe has indicated that it will argue for its diminished reservation configuration on the same evidence which the State contends supports disestablishment. CCP 4. For the reasons set forth below, and in the State's Petition in No. 10-929, the Tribe's position on the merits is mistaken. The United States, in seeming agreement that the Tribe's position lacks merit, now urges denial of this Conditional Cross-Petition. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-958 at 32. Nonetheless, the equities and practicalities of the situation persuade the State to support the grant of this Conditional Cross-Petition, in the event that the Petition in No. 10-929 is also granted, to allow the full range of arguments to be presented.

STATEMENT OF THE CASE

In 1858 a "Yankton Sioux Reservation" of roughly 430,000 acres was created out of a larger territory. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). The reservation area was then subjected

to allotment pursuant to the Dawes Act and a subsequent act *Id.* at 336. Roughly 262,000 acres were removed from common ownership and allotted to individual Indians; 168,000 acres were unallotted, and remained in common ownership *Id.* This "unallotted" land was the "surplus land."

A Yankton Indian Commission was appointed in 1892 and, that same year, negotiated a "cession and sum certain" agreement with the Yankton Sioux Tribe by which the Tribe agreed to cede all of its unallotted land then held in common (the 168,000 acres known as "surplus land") for a sum certain of $600,000. 1894 Act, Articles I and II, Pet. App., No. 10-929 at 339. As a consequence, the Tribe retained no land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. Because individual tribal members quickly disposed of their allotments and the United States itself sold allotments of deceased and incompetent Indians, the acreage held by individuals in allotted status declined from 262,000 acres to 43,358 acres by 1930. *State v. Greger*, 559 N.W.2d 854, 867 (S.D. 1997). By the time of the first trial in 1995, 232,000 of the original 262,000 acres of allotted land had been transferred in fee to non-Indians, the Tribe had acquired about 6,000 acres. *Yankton Sioux Tribe*, 522 U.S. at 339.

The Tribe's Question Presented asks this Court to recognize a "reservation" frozen in 1894, excluding only the surplus ceded land (on the basis of this Court's decision in *Yankton Sioux Tribe*, 522 U.S. at 358) but including all 262,000 acres of allotted land,

even though the Indian title to 88 percent of those lands has been extinguished and the lands have been conveyed to non-Indians. The result would be a "reservation" which would include roughly 30,000 acres of allotted lands owned by tribal members and 230,000 acres of lands owned by non-Indians. These parcels would be intermixed with the 168,000 acres of land ceded to the United States, acquired by non-Indians, and declared to be non-reservation by this Court in *Yankton Sioux Tribe*.

As unlikely as the configuration seems, it has appeared before, in very similar form, in this litigation. Immediately after this Court's decision in 1998, the Bureau of Indian Affairs apparently conceived it, and the District Court, at the urging of the Tribe and the United States, adopted a reservation configuration which consisted mainly of the allotted lands. *Gaffey I*, Pet. App., No. 10-929 at 253, 318-20. The Eighth Circuit, however, quickly overturned this decision. *Gaffey II*, Pet. App., No. 10-929 at 249. It is notable that, insofar as appears from the record, no map of this configuration had been prepared until after this Court's decision in *Yankton Sioux Tribe* in 1998. Even now, the Tribe fails to present a map to this Court which identifies the lands which it asserts would constitute "reservation" under the theory of the Conditional Cross-Petition.

DISCUSSION

The Tribe's Conditional Cross-Petition asks this Court to create a reservation configuration unknown to Indian law. Even so, the State does not object to the grant of the Petition, in the event that the State's Petition in No. 10-929 is granted, because, as the Tribe asserts, the arguments made in its Conditional Cross-Petition substantially overlap the arguments made by the other parties, and the Court's final determination may well benefit from consideration of all potential points of view.

A. The relief sought through grant of the Conditional Cross-Petition would create a configuration of a "reservation" never before seen in the law.

The reservation configuration sought by the Conditional Cross-Petition is unique. Except for the one year and two weeks in which the 1998 District Court's opinion, which adopted this "reservation," was effective, the Conditional Cross-Petitioners have not identified a single case, nor did the courts below, in which Congress was found to have created a "reservation" without external boundaries, which was comprised of roughly 90 percent fee land, 10 percent trust land of some kind, and intermingled with over 160,000 acres of non-reservation ceded land.

B. The Conditional Cross-Petition fails to articulate a coherent theoretical basis for granting the relief it seeks.

This case, from the first, has addressed the question of whether the Yankton Sioux Reservation has been disestablished or, at the least, diminished. This Court, in its 1998 decision, determined that the reservation *has* been at least diminished, and the exterior boundaries extinguished, by determining that the surplus land ceded to the United States by the 1894 Agreement was no longer "reservation." *Yankton Sioux Tribe*, 522 U.S. at 345, 347, 358. This Court found, however, that it "need not determine whether Congress disestablished the reservation altogether in order to resolve this case." *Id.* at 358. As demonstrated below, the opinions of this Court nonetheless illuminate the path which should be taken to ultimately resolve this case.

1. The operative language of the Yankton Agreement is precisely suited to "termination" but the Conditional Cross-Petition fails to even acknowledge that language.

The language of a surplus land agreement is the most important factor in determining whether disestablishment has taken place, and of that language, the "operative language" is of primary significance. *See Yankton Sioux Tribe*, 522 U.S. at 333; *Hagen v. Utah*, 510 U.S. 399, 412-14 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 593 n.15, 608 (1977).

The "operative language" of the Yankton Agreement is its "'cession' and 'sum certain' language" which this Court held is "'precisely suited' to terminating reservation status." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)). Virtually identical operative language in an 1891 Act had been held to disestablish the Lake Traverse Reservation in *DeCoteau*. For the Conditional Cross-Petition to succeed, it must, at a minimum, articulate a compelling reason to ignore the Yankton Agreement's operative language and this Court's interpretation of that language. The Conditional Cross-Petition fails to do so, because it fails even to *acknowledge* this language.[1]

2. The subsidiary language in the Yankton Agreement does not significantly undermine its operative language.

Instead of confronting the "operative language" of the 1894 Act, the Conditional Cross-Petition improperly assigns three other sections of the Act primary significance. CCP 13-14. This approach ignores *Yankton Sioux Tribe's* comparative analysis of the

[1] The Tribe in its Brief in Opposition, Nos. 10-929, 10-931, 10-932, likewise fails to directly address the "cession and sum certain" language but does argue, *id.* at 13, that the "text of the 1894 Act" applied only to "'ceded'" lands, a clear error given that this Court and the Eighth Circuit have both found that the 1894 Act removed the 1858 reservation boundaries. *Yankton Sioux Tribe*, 522 U.S. at 345, 347; *Gaffey II*, Pet. App., No. 10-929 at 203, 223, 224, 248.

effect of subsidiary and operative language in a cession agreement. In *Yankton Sioux Tribe*, the United States and the Tribe had "rest[ed] their argument" on the "saving clause in Article XVIII of the 1894 Act." 522 U.S. at 345. This Court, however, refused to give the "savings clause" such effect and limited it to preservation of annuities. *Id.* at 347-48. The Court's decision emphasizes the primacy of operative language even over very strong language in other subsidiary provisions, contrary to the position of the Conditional Cross-Petition.

In any event, the subsidiary provisions relied upon do not carry the weight assigned to them. The Conditional Cross-Petition argues that Article V of the 1894 Act provides for "continued funding of tribal courts of justice and other local institutions" and then strongly implies that this Court found "that provision" i.e., Article V, "reflects an expectation that the Tribe would maintain a sovereign existence" and so "'counsel[s] against finding the reservation terminated.'" CCP 13 (quoting *Yankton Sioux Tribe*, 522 U.S. at 350). In fact, *Yankton Sioux Tribe*, 522 U.S. at 350, does *not* discuss Article V, nor does Article V appear even to be mentioned in *Yankton Sioux Tribe*. Furthermore, Article V itself does *not* refer to "tribal courts of justice," as CCP 13 claims. *See* 1894 Act, Art. V, Pet. App., No. 10-929 at 340-41. Rather, Article V refers to "courts of justice and other local institutions," *Id.* The reference is thus to support of "local," i.e., city, county and state, and not "tribal" courts,

contrary to the position of CCP 13. *Cf. South Dakota v. Bourland*, 508 U.S. 679, 697, n.16 (1993).

Next, the Conditional Cross-Petition relies on Article VIII which "reserved from sale to settlers" certain lands which had been "ceded" to the United States but were then "occupied by the United States for agency, schools and other purposes." CCP 13. *See* 1894 Act, Art. VIII, Pet. App., No. 10-929 at 342-43. The lands could be sold to settlers after they were "no longer required for such purposes." *Id.* at 343. The Tribe urges that Article VIII somehow demonstrates the continued existence of a "reservation" but the argument fails. Retention of such areas was "common, even for a terminated reservation." *Bruguier v. Class*, Pet. App. 10-929 at 187. Similar agency and school lands were reserved at the Lake Traverse or Sisseton Reservation, yet it, like areas of other reservations, was found disestablished. *See DeCoteau*, 420 U.S. at 435 n.16, 438 n.19; *Bruguier*, Pet. App. 10-929 at 187. *See also Rosebud*, 430 U.S. at 622 (Marshall, J., dissenting and referring to allowance for reservation of land in disestablished counties for "Indian schools, religious missions and service agencies"); *United States v. Pelican*, 232 U.S. 442, 446 (1914) (reservation of "school and mill lands" in area removed from reservation); 36 Stat. 440 (1910) (allowing, in Section 1, Secretary to reserve lands for "agency, school and religious purposes" in the area of Pine Ridge Reservation later held disestablished in *United*

States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975)).

Further, the "agency" lands were "unallotted" and "ceded," 1894 Act, Article I, Pet. App., No. 10-929 at 339; *Gaffey II*, Pet. App., No. 10-929 at 209, and this Court has found that "unallotted lands ceded" to the United States did not retain "reservation" status. *Yankton Sioux Tribe*, 522 U.S. at 342. Lands effectively declared to be *non-reservation* could hardly support the existence of a "reservation."

In addition, the Conditional Cross-Petition elevates the significance of the temporary retention of surplus lands. Such retention merely indicated that the United States perceived that it retained a responsibility to tribal members on the remaining "allotted lands" and in the area of the former reservation and that it would continue to supply services to them. *See Pelican*, 232 U.S. at 449-50. That is not enough to support the existence of a "reservation." As *Alaska v. Native Village of Venetie Tribal Government* found, the "mere provision of 'desperately needed' social programs" cannot support a finding of Indian country. 522 U.S. 520, 534 (1998). *See also* Report of Agent for Sisseton Agency (1900) (referencing, in 1900, at the Lake Traverse or Sisseton Reservation, disestablished nine years before in 1891, an "industrial boarding school," an "office" for the agent, and services provided by the

agency related to leasing and policing. 1998 JA 666-67.[3]

Finally, the Conditional Cross-Petition cites Article XVII, the liquor provision, as demonstrating the existence of a "reservation" CCP 13. *See* 1894 Act, Art XVII, Pet. App., No. 10-929 at 347. This argument ignores the fact that this Court found that a similar liquor provision *supported* the disestablishment of Mellette County from the Rosebud Sioux Reservation. *Rosebud Sioux Tribe*, 430 U.S. at 613 n.47 The Conditional Cross-Petition also ignores the fact that liquor had been illegal in Indian country since 1832. Testimony of Herbert Hoover, 1995 Transcript at 73. Article XVII was unnecessary if the status of the lands had not been altered from reservation to non-reservation by the 1894 Act.

[3] The Tribe at CCP 6 mischaracterizes the agency lands, labeling them "reserved agency trust lands" in 1929. These lands, however, had been ceded to the United States and were assuredly not in "trust" from 1894 until at least 1929. Indeed, the Solicitor found that the lands had been conveyed to the United States in 1894 "free and clear of all claims of the Indians." Opinions of the Solicitor, M-27671 (Mar. 1, 1934), 1998 JA 571 (Citations to documents follow the form set out in Petition, No. 10-929, at 5 n.2).

3. The relinquishment of all tribal land in common signaled the loss of a "critical component of reservation status" and not the retention of "reservation" status.

The Conditional Cross-Petition argues that the mere creation of allotments and the desire expressed by Government negotiators that individual Indians would retain their allotments signaled retention of "reservation" status. CCP 13-14. This approach misinterprets the occurrences of the late 1800's and the critical role of "land in common." After 1858, the Tribe held roughly 430,000 acres of land in common. Allotment is the process whereby the United States accomplished the permanent transfer of the part of the tribal land held in common to individual Indians *Gaffey II*, Pet. App., No. 10-929 at 209-10; Nell Newton, Editor, *Cohen's Handbook of Federal Indian Law* (2005 Edition). Allotment diminished the area of land held in common by the Tribe by 262,000 acres. *See Yankton Sioux Tribe*, 522 U.S. at 336. The United States then obtained the "cession" of the remainder of the land in common – 168,000 acres – by way of a "sum certain" agreement in 1894. 1894 Act, Arts. I and II, Pet. App., No. 10-929 at 339. Therefore, after 1894, the Tribe retained *no* land in common. *Id.*; *Gaffey II*, Pet. App., No. 10-929 at 229-30. This is critical because, as *Yankton Sioux Tribe* finds, by failing to retain any land in common, a "critical component of reservation status" was lost. 522 U.S. at 346. Allotment and cession of land held in common worked in tandem to eliminate this critical

component of "reservation" status. *See id* ; *Bruguier*, Pet. App., No. 10-929 at 182-85.

The approach of the Conditional Cross-Petition also confuses the function and history of an "allotment" with that of a "reservation." While both are "Indian country," an "allotment" and a "reservation" are not the same. "Reservation" lands retain their reservation status regardless of their ownership; "allotments" on the other hand, retain their allotted status only so long as their "Indian title" is retained. 18 U.S.C. §§ 1151(a), (c). As *Venetie* finds, "allotments" are "parcels of land created out of a diminished Indian reservation and held in trust . . . for the benefit of individual Indians." 522 U.S. at 529. In the case of the Yankton area, the steady historical increase in state jurisdiction is the story of the surrender of 220,000 acres of individual allotments and their loss of "Indian title." *See Bruguier*, Pet. App., No. 10-929 at 190-94. *See also Yankton Sioux Tribe*, 522 U.S. at 357. The attempt of the Conditional Cross-Petition to make an allotment equivalent to a "reservation" should fail.

The Conditional Cross-Petition also incorrectly implies that the Government made a determined effort to cause tribal members to retain their allotments and that this somehow signaled "reservation" status for the allotments. The record shows, to the contrary, that roughly 230,000 acres of the original 262,000 acres of allotted land have left allotted status. *Yankton Sioux Tribe*, 522 U.S. at 339. Not only did tribal members quickly dispose of their allotments,

but the United States itself actively sought the end of allotted status through the regular sales of inherited lands and lands of non-competents to non-Indians, 1998 JA 821-34, through the so-called federal forced fee policy, 1995 Transcript 232; 1998 JA 920-23, by allowing the twenty-five year trust period to expire, 1998 JA 1163-64, and otherwise.

C. The jurisdictional history of the area is inconsistent with reservation status.

The Conditional Cross-Petition is bereft of evidence or even argument regarding the jurisdictional history of the lands for which it seeks to establish "reservation" status, although such history is important in the analysis. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Rosebud*, 430 U.S. at 603-05. The federal and state courts have consistently found that the State, not the federal government or the Tribe, has exercised jurisdiction over non-Indian fee lands within the former boundaries. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Gaffey II*, Pet. App., No. 10-929 at 245-47; *Bruguier*, Pet. App., No. 10-929 at 190-92. The tribal proposal, if adopted by this Court, would radically alter these arrangements and the State would be deprived of jurisdiction over all of the lands held in allotted status in 1894, even though over roughly 230,000 acres of former allotted land are now held in fee by non-Indians. Indeed, even the United States acknowledges that it has "long" not exercised

jurisdiction over non-trust lands. Brief for the United States in Opposition, Nos. 10-929, 10-931, 10-932, and 10-1058, at 30-31.

The Tribe's argument is doubly weakened in that, until recently, the Tribe itself had claimed only a small amount of land or reservation. Its 1962 Constitution "defines the Tribe's territory to include only those tribal lands within the 1858 boundaries 'now owned' by the Tribe." *Yankton Sioux Tribe*, 522 U.S. at 357 (quoting Constitution and Bylaws of the Yankton Sioux Tribal Business and Claims Committee, Art. VI, § 1). Only in 1990, almost a century after the 1894 Act, did the Tribe amend its Constitution to claim "all lands and waters . . . within the exterior boundaries of the 1858 Treaty." 1998 JA 1129.*

CONCLUSION

The State has respectfully requested this Court to grant certiorari in its Petition in No. 10-929. The State agrees that grant of the Conditional Cross-Petition is appropriate in the event that its Petition is granted, in that such a grant will enable all parties to

* The Tribe is incorrect insofar as it asserts, without citation of evidence, that all the parties have become "adjusted" to the Eighth Circuit ruling. CCF 3, 11. That much is clear from the Amicus Briefs already submitted. The assertion, moreover, undermines, rather than supports, the grant of the relief requested by this Conditional Cross-Petition.

offer the most complete analysis of the facts and law possible.

Respectfully submitted,

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